IN THE

Supreme Court of the United States

October Term, 1965

No. 233

JAMES J. WALDRON,

Petitioner,

against

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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Respondent attempts to characterize the important controversy raised by this case as a dispute over the sufficiency and probative value of the petitioner's expert testimony at trial. This is an ill-conceived effort to belittle the issues and avoid review by this Court, and respondent's brief studiously ignores the contrary view taken by the two Courts below. Respondent's brief in effect concedes that if the record was sufficient to present a jury issue, a basic and novel question is raised by this case.

The District Court Judge recognized the presence of this serious legal question and was obviously troubled by it. It was first presented during the trial testimony of the petitioner's maritime expert (28a, 31a-32a), a full captain with over 40 years maritime experience (22a-23a). The ruling was then in petitioner's favor, and the captain's testimony was ruled relevant (28a).

The trial lasted 14 days (1a). On the last day of trial the District Court Judge reversed himself and dismissed this aspect of the unseaworthiness claim (55a-56a).

Petitioner's post-trial motion was not decided until five months after submission (1a). A careful—albeit, we believe, erroneous—opinion was then written by the trial judge (A13-A14) clearly indicating that the trial evidence sufficiently presented the legal issue, but in view of "certain language" in two recent Second Circuit opinions, adhering to his original dismissal decision.[1] Nowhere did the District Court Judge state that the evidence—opinion or otherwise—presented by petitioner was insufficient, without probative value, or incapable of requiring an answer to the legal issue presented. His careful treatment of the legal issue is completely at odds with respondent's counsel's present attempts to denigrate the importance of the question.

Similarly, the Court of Appeals for the Second Circuit, both in its majority and dissenting opinions, found the evidence sufficient to raise the important legal question and treated the legal issue fully. The effort plainly invested in the preparation of Judge Medina's extensive opinion (A2-A10) is totally inconsistent with a view that the controversy rested on insubstantial, unprobative or insufficient trial evidence. Judge Smith's dissenting opinion similarly deals directly with the legal questions and could not be based on anything but a determination that the record evidence below sufficiently presented these issues.

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[1] These Second Circuit opinions were *Pinto* v. *States Marine Corp.*, 296 F. 2d 1 (2d Cir. 1961) and *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2d Cir. 1961) (A14). The prevailing views in these cases have not been cited with approval by other circuit courts, their authority has been sharply challenged by other Second Circuit judges (296 F. 2d at 8; see also, *Nuzzo* v. *Rederei, A/S Wallenco*, 304 F. 2d 506, 512-3 (2d Cir. 1962, Clark J. dissenting), and *Pinto* is concededly in conflict with opinions of other circuits (296 F. 2d at 7, fn. 6). Both *Pinto* and *Ezekiel* have drawn critical comment. See, *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harvard Law Rev. 819, 824 (1963); *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1183, fn. 24 (1966).

Respondent's brief seeks to cite Judge Medina's opinion to the effect that the result below was based upon "a uniform course of judicial opinion" with no "authority to the contrary" (Resp. Br., p. 1). However, Judge Medina's opinion cited no supporting authority on the critical issue here presented except a 1933 District Court opinion (*The Magdapur,* 3 F. Supp. 971) and two recent Second Circuit opinions (*Pinto, supra,* and *Ezekiel, supra*) (see A9-A10). The "obsolescence" of pre-1940 lower court decisions in this area has been specifically noted by Professors Gilmore and Black (*The Law of Admiralty,* § 6-6, p. 253, fn. 12), and the fact that divided panels of the Second Circuit have previously made similar rulings hardly renders their view free from certiorari and review. The weight of the authorities actually cited by the judges of the Court of Appeals was in petitioner's favor, for Judge Smith's dissenting opinion (A10-A12) cites leading cases of this Court and recent decisions of the Third and Ninth Circuits as requiring reversal of the result below.

Nothwithstanding its belittling brief to this Court and its attempt to label this case as "peculiar" (Resp. Br., p. 5), respondent conceded below that affirmance would place the Second Circuit in direct conflict with the Third Circuit in an area where the facts were bound to recur. See *Ferrante* v. *Swedish-American Lines,* 331 F.2d 571 (3rd Cir. 1964), *cert. dismissed,* 379 U. S. 801 and *Thompson* v. *Calmar S.S. Corp.,* 331 F.2d 657 (3rd Cir. 1964), *cert. den.* 379 U. S. 13. (See Appellee's Brief to the Court of Appeals, pp. 15-16.)

The instant case, and its conflict with the Ninth Circuit decision in *Redfern,* has already attracted the critical attention of the commentators. Thus, *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine,* 66 Columbia Law Rev. 1180, 1181 (June, 1966) states:

> "two recent Court of Appeals decisions [*Waldron* and *Redfern*] have reached conflicting conclusions as

> to whether a failure to allocate an adequate number of crewmen to perform a particular duty comprises unseaworthiness."

The note sharply criticizes the decision below, stating:

> "The distinction drawn in *Waldron* between improper use of sound gear, which may constitute unseaworthiness, and similar misuse of crew, which does not, finds little support in logic, or in the humanitarian policy which underlies the expanding remedy. Nor does precedent dictate the restricted duty when misuse of crew is involved." (66 Col. Law Rev. at 1182)

The article further criticizes the Second Circuit injection of negligence doctrines into unseaworthiness determinations (66 Col. Law Rev. at 1183), points out that *Waldron* conflicts with other recent Third and Fourth Circuit decisions (66 Col. Law Rev. at 1183, fn. 22 and at 1185, fn. 39) and concludes that the *Waldron* doctrine rests on "irrational distinctions" contrary to the policy and humanitarian trends dictated by this Court's opinions over the past "two decades" (66 Col. Law Rev. at 1185).

The conflict with the Ninth Circuit's recent opinion in *America President Lines, Ltd.* v. *Redfern*, 345 F.2d 629 (1965) is denied by respondent, although recognized and emphasized by Judge Smith below (A11). Respondent's tortured distinction that the sea valve involved in *Redfern* was inherently defective because two men were required to turn it is directly rebutted by plain common sense and by the Ninth Circuit's opinion (345 F.2d at 631-2; A11).[2] The

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[2] The same analysis of *Redfern*—as a case finding unseaworthiness because of inadequate manpower rather than because of any defect in gear—is set forth in *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Col. Law Rev. at 1182 1185 (June, 1966).

Court there stressed that sea valves are intentionally large and difficult to open, and are fit for their purpose only if they are so difficult. Liability for unseaworthiness was found by the Ninth Circuit in *Redfern* specifically because only one man was provided to open this otherwise seaworthy valve, and the condition of one man doing a job that required two men was—at least in the Ninth Circuit's view—a situation within the protection of the doctrine of unseaworthiness.[3]

Petitioner's experienced maritime expert, Captain Darrigan, held the same view in this case. He testified:

> "I would say to drag a line 60 feet or more would need 3 or 4 men at least of that type and weight. (33a)
>
> • • •
>
> I would figure that that is an 8 inch mooring line and to drag it along the deck or the street, there is a lot of physical strength needed. (33a)
>
> • • •
>
> My opinion is that this was an unsafe operation. (37a)
>
> • • •
>
> Q. . . . do you nevertheless feel that safe and prudent seamanship dictated that 3 or 4 men be assigned to take this line from the place marked with the R to the chock marked with the II? A. I do. (42a)
>
> • • •

[3] Although there is an apparent conflict as to the ship's liability for unseaworthiness where improper work methods are used with otherwise safe gear within Professors Gilmore & Black's text [*The Law of Admiralty* (1957) (compare § 6-39, p. 320, fn. 221 with § 6-5[1, 2], p. 252)], even § 6-39 concedes that nonliability, as a matter of law, is a "rare" and "almost theoretical" circumstance.

Q. What is your opinion as to whether the vessel was sufficiently manned with regard to the aft deck docking gang? A. I said no." (53a)[4]

Respondent's counsel's question on cross-examination as to the hypothetical "25 common factors" relevant to the docking operation (44a) may have been good jury trial tactics, but was hardly probative in the circumstances of this case. The docking was at a Brooklyn pier in New York Harbor, at high noon on a May day (16a). According to the log it took only 11 minutes, with no unusual weather, tide or shipping conditions (47a-48a). To a man of Captain Darrigan's experience, there were no special or unusual conditions requiring adjustment of his basic view that the safety of the job required three or four men. On redirect examination, he specifically stated that the hypothetical "25 other factors" in no way changed his opinion that the particular job here involved, under the actual circumstances shown by the ship's log, would require three or four men (46a).[5]

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[4] Captain Darrigan's expert testimony was probably not even necessary for petitioner's *prima facie* case. A jury could well have found that the safe performance of the urgent hauling of a wet 56-foot manila line of 8" diameter, weighing over 100 pounds, across a misty steel deck and letting it out through a chock required more than two men, particularly in the light of testimony that the custom was to provide at least 3 men for such tasks (7a-8a). *Salem* v. *U. S. Lines Co.*, 370 U. S. 31, 35-7 (1962).

[5] Certainly, on respondent's motion to dismiss at the close of all the evidence, petitioner's testimony and that of his expert was entitled to be treated as true and the most favorable inferences granted in evaluating whether the evidence was sufficient to present a jury case. *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 327, 329, 330-1 (1960). Captain Darrigan's opinion, although perhaps not necessary to petitioner's *prima facie* case, was clearly admissible and raised an issue for jury determination. *Eastern Transportation Line* v. *Hope*, 95 U. S. 297 (1877); *Carlson* v. *Chisholm-Moore Hoist Corp.*, 281 F.2d 766, 772 (2d Cir. 1960).

The trial evidence did disclose that the only unusual event during the docking was that a sudden order was given to let the heavy manila line out through a chock that was farther forward than the chocks that were usually used (5a, 7a, 19a). The manila line was coiled 56 feet aft of that chock (26a), and it was this order which gave rise to the petitioner's assignment to the task in which he was injured and exposed him to the risk of that injury (5a-10a).

Although petitioner was injured during performance of his work orders aboard ship, the courts below deprived him of the protection of the doctrine of unseaworthiness. Taken as a whole the ship had a full crew and the accident did not involve inherently defective gear. Petitioner's injury, however, was caused by an insufficiency of personnel for the particular task at hand and by adoption of an improper work method, or, as Judge Smith dissenting below alternatively phrased it, through "using equipment in a manner which makes it unsafe" (A11).

The fundamental legal and social question which this case presents is whether the risk and burden of such injury is to be borne by the ship owner or by the seaman alone.[6] Of particular concern is the fact that the Second Circuit, which has adopted a restricted anti-seaman position contrary to this Court's philosophy and doctrine, is the very jurisdiction which handles the greatest bulk of seamen's cases.

To the extent that the question here presented has been squarely answered in petitioner's favor by this Court in

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[6] The controversy of whether the ship owner or the seaman bears this type of burden and risk has been sharply disturbing the Second Circuit for several years. Compare the instant case, *Nuzzo* v. *Rederei, A.S. Willenco*, 304 F.2d 506, 512-3 (1962, Clark, J. dissenting) and *Pinto* v. *States Marine Corp.*, 296 F.2d 1, 8 (1961, Smith, J. dissenting) with *Reid* v. *Quebec Paper Sales & Trans. Co.*, 340 F.2d 34, 40 (1965, Friendly, J. dissenting); see also, *Puddu* v. *Netherlands S.S. Co.*, 303 F.2d 752 (1962, 4 separate opinions).

Mahnich v. *Southern S.S. Co.*, 321 U. S. 96, 103-4 (1944) and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423, 427-8 (1959)—as Judge Smith believed (A11-A12)—certiorari should be granted to correct this "conflict with applicable decisions of this Court". *Supreme Court Rules*, Rule 19(1)(b).

To the extent that the question is a novel one "which has not been . . . settled by this Court" [*Supreme Court Rules*, Rule 19(1)(b)], the conflict between the Circuits, the basic recurring nature of the situation presented, and the unusual circumstance of judicial dismissal of a seaman's claim during a trial by jury, fully justify the grant of the present petition.[7]

Respectfully submitted,

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[7] The "continued confusion in the lower courts" and need for this Court's review and "more definite statement" in this area has been specifically noted. *The Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harvard Law Rev. 819, 830 (1963); *Admiralty: Inadequate Manpower and the Unseaworthiness Doctrine*, 66 Columbia Law Rev. 1180, 1184 (1966).

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